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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT TACOMA

8 KEVIN ABDUL GILBERT, et al.,

9 Plaintiffs,

10 v.

11 STEPHEN SINCLAIR, et al.,

12 Defendants.

CASE NO. C19-5406 BHS

ORDER ADOPTING IN PART  
AND MODIFYING IN PART  
REPORT AND  
RECOMMENDATION,  
GRANTING PLAINTIFF'S  
MOTION TO AMEND  
OBJECTIONS, AND DENYING  
OTHER MOTIONS

13 This matter comes before the Court on the Report and Recommendation ("R&R")  
14 of the Honorable Theresa L. Fricke, United States Magistrate Judge, Dkt. 38; Plaintiffs  
15 Kevin Abdul Gilbert ("Gilbert"), Kenneth Ramone Alston ("Alston"), and Reginald  
16 Wayne Wilton's ("Wilton") (collectively "Plaintiffs") objections to the R&R, Dkts. 39,  
17 40, 42; Wilton's motion for an injunction, Dkt. 45; Wilton's motion to amend objections,  
18 Dkt. 47; Gilbert's motion to appoint counsel, Dkt. 52, Wilton's motion for extension of  
19 time, Dkt. 57; and Gilbert's motion for hearing, Dkt. 58.

20 **I. PROCEDURAL HISTORY**

21 On June 19, 2019, Plaintiffs filed an amended civil rights complaint against  
22 Defendants Ron Haynes, Pamela Iverson, and Stephen Sinclair ("Defendants"). Dkt. 12.

1 Plaintiffs allege that Defendants improperly altered their length of community custody in  
2 violation of the Ex Post Facto Clause of the United States Constitution. *Id.*

3 On July 16, 2019, Defendants filed a motion to dismiss based on numerous  
4 inadequacies in the complaint, including the failure to plead an actual, compensable  
5 injury under 42 U.S.C. § 1983. Dkt. 14 at 4 (citing *Heck v. Humphrey*, 512 U.S. 477, 487  
6 n.7 (1994)). On January 31, 2020, Judge Fricke issued the R&R sua sponte converting  
7 Defendants' lack of injury argument into a jurisdictional lack of standing issue and  
8 recommending that the Court dismiss each plaintiff's claim for lack of standing. Dkt. 38.  
9 On February 13, 2020, Gilbert filed objections. Dkt. 39. On February 20, 2020, Wilton  
10 filed objections arguing in part that it was an error to base dismissal on lack of standing  
11 when Defendants did not raise the argument in their motion. Dkt. 40 at 4–5. On March  
12 11, 2020 Alston filed objections. Dkt. 42.

13 On March 30, 2020, Wilton filed a motion for an injunction to prevent improper  
14 cell house searches that allegedly occurred in retaliation for this suit. Dkt. 45.

15 On April 6, 2020, Wilton filed a motion to amend his objections. Dkt. 47. On  
16 April 17, 2020, Defendants responded and opposed the untimely amended objections.  
17 Dkt. 48.

18 On April 21, 2020, Defendants responded to Wilton's motion for injunction  
19 arguing that it should be denied as outside the scope of the complaint and fails on the  
20 merits. Dkt. 49.

21 On April 22, 2020, Gilbert filed a motion to appoint counsel. Dkt. 52.  
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1 On April 27, 2020, Wilton filed a motion for an extension of time requesting an  
 2 extra twenty days to file a reply to Defendants’ opposition to his motion for injunction.  
 3 Dkt. 57. On April 29, 2020, Gilbert filed a motion for a hearing on the R&R. Dkt. 58.

4 On May 1, 2020, Defendants opposed Gilbert’s motion to appoint. Dkt. 53.

5 On May 8, 2020, Defendants opposed Wilton’s motion for an extension of time.  
 6 Dkt. 61.

## 7 II. DISCUSSION

8 The district judge must determine de novo any part of the magistrate judge’s  
 9 disposition that has been properly objected to. The district judge may accept, reject, or  
 10 modify the recommended disposition; receive further evidence; or return the matter to the  
 11 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

### 12 A. Standing

13 “To establish Article III standing, a plaintiff must show (1) an injury in fact, (2) a  
 14 sufficient causal connection between the injury and the conduct complained of, and (3) a  
 15 likelihood that the injury will be redressed by a favorable decision.” *Susan B. Anthony*  
 16 *List v. Driehaus*, 573 U.S. 149, 157–58 (2014) (citing *Lujan v. Defenders of Wildlife*, 504  
 17 U.S. 555, 560 (1992)) (internal quotation marks omitted).

18 “[F]ederal courts are required sua sponte to examine jurisdictional issues such as  
 19 standing.” *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir.1999). Thus,  
 20 a “district court ha[s] both the power and the duty to raise the adequacy of [Plaintiffs’]  
 21 standing sua sponte.” *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir.  
 22 2002).

1 In this case, the Court concludes that Judge Fricke properly addressed the issue of  
2 no injury sua sponte as the jurisdictional issue of lack of standing. While Plaintiffs may  
3 not have had notice and an opportunity to respond before Judge Fricke issued the R&R,  
4 they have all filed objections satisfying any concerns with a violation of due process.  
5 Regarding the merits, Plaintiffs have failed to establish any injury in fact. Each plaintiff  
6 received a sentence of 24–48 months of community custody following the period of  
7 incarceration. Although Washington subsequently altered each term to 36 months by  
8 statute, Alston successfully challenged the change through the state courts, and his term  
9 of community custody has been recalculated to conform to the original 24–48 months.  
10 Alston has failed to establish any injury in the process of altering and then reestablishing  
11 his post-incarceration period of custody. Gilbert and Wilton have remained incarcerated  
12 the entire time because their estimated dates of release are 2039 and 2029, respectively.  
13 They fail to establish any injury in challenging their post-incarceration period of  
14 community custody while incarcerated. Therefore, the Court adopts the R&R dismissing  
15 Plaintiffs’ amended complaint for lack of standing.

16 Plaintiffs also challenge whether the amended complaint should be dismissed with  
17 or without prejudice. “[T]he law universally disfavors dismissing an action with  
18 prejudice based on lack of standing, and there is a strong presumption that such a  
19 dismissal is improper.” *Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328,  
20 1333 (Fed. Cir. 2009). While an argument could be made that Plaintiffs can never  
21 establish an injury to support their claim, the Court finds no reason to reach that  
22

1 conclusion at this time. Therefore, the Court concludes that dismissal without prejudice  
2 is proper.

### 3 **B. Injunction**

4 The Court agrees with Defendants that Wilton has requested an injunction based  
5 on retaliation, which is clearly beyond the scope of the complaint. Therefore, the Court  
6 denies Wilton's motion.

### 7 **C. Other motions**

8 The Court grants the motion to amend and considered Wilton's amended  
9 objections. On the other hand, the Court denies all the other motions as moot in light of  
10 the dismissal for lack of standing.

## 11 **III. ORDER**

12 Therefore, the Court having considered the R&R, Plaintiffs' objections, and the  
13 remaining record, does hereby find and order as follows:

- 14 (1) The R&R is **ADOPTED in part** and **MODIFIED in part**;
- 15 (2) Defendants' motion to dismiss, Dkt. 14, is **GRANTED** and Plaintiffs'  
16 amended complaint is **DISMISSED without prejudice**;
- 17 (3) Wilton's motion to amend objections, Dkt. 47, is **GRANTED**;
- 18 (4) Wilton's motion for injunction, Dkt. 45, Gilbert's motion to appoint, Dkt.  
19 52, Wilton's motion for an extension of time, Dkt. 57, and Gilbert's motion  
20 for a hearing, Dkt. 58, are **DENIED**;
- 21 (5) Plaintiffs' *in forma pauperis* status are **REVOKED** for purposes of appeal;  
22 and

1 (6) The Clerk shall enter a JUDGMENT and close the case.

2 Dated this 12th day of May, 2020.

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5 BENJAMIN H. SETTLE  
6 United States District Judge  
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